

FILED

APR 19 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAVIER MARTINEZ-ESPINOZA,

Defendant - Appellant.

No. 05-50652

D.C. No. CR-04-01449-JTM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted April 10, 2006^{**}

Before: KOZINSKI, RYMER and PAEZ, Circuit Judges.

Appellee has filed an unopposed motion for summary vacation of the district court's judgment and remand for a new trial or entry of a guilty plea based on the parties' charge bargain. Appellee admits that, in light of this court's recent

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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decision in *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005), the expert testimony admitted and arguments advanced at trial on behalf of the prosecution regarding the issue of derivative citizenship constituted reversible error.

Accordingly, appellee's motion is granted. The judgment is vacated and the case is remanded to the district court for a new trial or the entry of a guilty plea based on the parties' charge bargain.

VACATED AND REMANDED.